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Supreme Court, U.S.
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No. 00-1491

IN THE

Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,
Petitioner,

v.

GUILLERMO NUEVA & LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The regulatory scheme at issue in this case is straightforward and has existed without significant change since at least 1935. But, like the Courts of Appeals for the Ninth and Tenth Circuits before them, respondents have misconstrued the text of the Form MCS-90 Endorsement (the "MCS-90"), disregarded the statutory and regulatory framework in which it operates, and ignored its history. Respondents also appear to think that the MCS-90 was the first endorsement of its kind, and that it first appeared in 1982 and then vanished with the repeal of the Motor Carrier Act of 1980 ("MCA"), in 1996. Respondents are wrong.

As a result of these basic errors, respondents do not perceive—or choose to ignore—the profound division between the Ninth and Tenth Circuits, on one hand, and the D.C., Third, Fifth, and Eighth Circuits, on the other. The latter group has made clear that federal law requires only that insurers of interstate motor carriers pay judgments entered against the motor carriers named in their policies. In conflict with these courts, and with the language of the relevant statutes and regulations (and the MCS-90 itself), the Ninth and Tenth Circuits have held that the MCS-90 changes the terms of policies to which it applies, requiring an insurer to pay a judgment against a party who is not covered by its policy, even without a judgment against its insured motor carrier.

Although the cases cited in the petition involve various iterations of the relevant statutes, regulations, and endorsements, the relevant aspects of the regulatory scheme are unchanged and remain in effect to this day. Thus, respondents err in suggesting that prior case law does not indicate a conflict among the circuits, and that the question presented is no longer meaningful. The factual distinctions emphasized by respondents do not obscure the disagreement among the courts, and the erroneous suggestion that the MCS-90 is no longer in effect cannot diminish the importance of this issue.

1. Respondents' arguments that the decision below does not conflict with rulings of other circuits are unconvincing.

a. Respondents claim that cases decided prior to the enactment of the MCA and the promulgation of the MCS-90 cannot give rise to a conflict with cases that interpret the MCS-90. *See* Resp. Br. at 14 & n.10, 22. This argument ignores the fact that, since 1935, the statutory and regulatory scheme has not changed in any way material to this case. Throughout that time, federal law has required motor carriers to obtain insurance to pay judgments against them for negligence in the operation of their vehicles, and has implemented that requirement through an identically worded endorsement, now known as the MCS-90. *See* Pet. at 14-15.

The BMC-90 endorsement (the predecessor of the MCS-90) was drafted "in the form required by Sec. 215 of Part II of the Interstate Commerce Act . . ., and orders of the Interstate Commerce Commission of March 25, 1940 and April 4, 1940. . . ." *Commercial Standard Ins. Co. v. Robertson*, 159 F.2d 405, 406 (6th Cir. 1947). Developed by the Department of Transportation ("DOT") in response to the MCA, the MCS-90 was adopted by the Interstate Commerce Commission ("ICC") in 1982 under its rulemaking authority under the MCA, to "reconcile the administrative differences in the insurance programs of [the ICC] and the [DOT]." *Motor Carriers of Property Minimum Amounts of Bodily Injury and Property Damage Liab. Ins. (49 CFR Parts 1003 and 1043)*, 132 M.C.C. 948, 948 (1982). The MCS-90 differed from the BMC-90 by requiring coverage for environmental restoration, as well as bodily injury and property damage, by including a schedule of limits, and stating that it is the motor carrier's obligation to satisfy the financial responsibility requirement. *Id.* at 952. But in all relevant respects, the BMC-90 in use before 1980 was identical to the MCS-90.

Courts have thus treated the BMC-90 and the MCS-90 as interchangeable, and have naturally used precedents involv-

ing the former to interpret the latter. For example, in a case involving a 1984 accident, the court relied on three cases from the early 1970s, and disagreed with several cases that predated the MCS-90. *See Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357 (10th Cir. 1989). The court took for granted that pre-1980 cases provided applicable precedents. *See also Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 611 (5th Cir. 1989) (describing the MCS-90 and BMC-90 as "identical in relevant part"). Changes in the names of the law, regulations, and endorsements are irrelevant. The substance of the provisions is identical, and the disagreement among the courts is substantial.

b. Respondents identify various factual distinctions that purportedly eliminate any conflict between the cases cited in the petition and the Ninth Circuit's decision. But these trivial differences cannot obscure a fundamental disagreement between the circuits. The Ninth and Tenth Circuits have held that the MCS-90 amends an insurance policy to which it applies, requiring the insurer to pay judgments entered against parties not covered by the base policy, even in the absence of a judgment against the named insured. The cases cited in the petition flatly conflict with that holding.[1]

In *National Mutual Insurance Co. v. Liberty Mutual Insurance Co.*, 196 F.2d 597, 600 (D.C. Cir.), *cert. denied*, 344 U.S. 819 (1952), the court held that the ICC endorsement, "doubtless would have enured to the benefit of [the victim], had she chosen to sue [the motor carrier]," but that it did not "shift the [owner-operator's] liability [to the motor carrier's insurer]" or "make [the owner-operator] an 'insured' under the [motor carrier's] policy." Thus, the court made clear

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[1] Though respondents criticize the petition for claiming that a majority of courts have rejected the Ninth Circuit's position, *see* Resp. Br. at 19 n.14, a clear majority (4 of 6) of the courts of appeals that have considered the issue have held that an insurer is liable under federal law only for judgments against its named insured motor carrier.

that the endorsement and underlying regulatory scheme do not alter the terms of existing insurance policies or require payment in the absence of a judgment against the named insured. Though the court noted that the "ICC endorsement" was required for the protection of the public, it never suggested that the meaning of the word "insured" would have differed had the case involved a member of the public rather than two insurers, and there is no basis in the statute, regulations, or the endorsement for this distinction. Respondents' effort to minimize the conflict is therefore unconvincing.[2]

Respondents' attempts to distinguish *Wellman v. Liberty Mutual Insurance Co.*, 496 F.2d 131 (8th Cir. 1974), are no more fruitful. After sustaining injuries in an accident with a vehicle driven by its owner and leased to an ICC-approved motor carrier, plaintiffs obtained a default judgment against the owner-operator, but not the motor carrier. Plaintiffs then sought to satisfy that judgment from proceeds of the motor carrier's insurance policy. Although the court held that the owner-operator was not an "insured" under that policy, plaintiffs argued that because one applicable regulation, 49

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[2] Respondents are also quite wrong to suggest that the Tenth Circuit agrees with other circuits that the MCS-90 has no application in disputes between insurers. *See* Resp. Br. at 15. In fact, there is a longstanding conflict on this very point. While the Tenth Circuit holds that the MCS-90 converts the policy to which applies into a primary policy, *see Empire Fire & Marine Ins. Co. v. Guaranty National Ins. Co.*, 868 F.2d 357, 363 (10th Cir.1989); most others hold that it has no effect on the base policy. *See Canal Ins. Co.*, 889 F.2d at 611; *see also* Harold A. Weston, Annotation, *Effect of Motor Carrier Provisions on Insurance and Indemnity Agreements (49 U.S.C.A. § 13906, 14101) in Allocating Losses Involving Interstate Motor Carriers*, 157 A.L.R. Fed. 549, § 6 (1999) (noting division of authority and the Tenth Circuit's "'minority' view that the MCS-90 makes the policy primary"). The Tenth Circuit's approach in both contexts appears to flow from its understanding that the terms of the MCS-90 and the terms of related insurance policies are not independent, and that the meaning of one influences the other. By granting review of this case, the Court could also address this related disagreement about the effect of the MCS-90 in disputes between insurers.

C.F.R. § 1057.4, required the motor carrier to take responsibility for vehicles and equipment used in its business, its insurance policy necessarily covered judgments against persons operating those vehicles.

The Eighth Circuit rejected this contention, holding that the applicable law and regulations did not require the insurer "to pay a judgment for others who are not mentioned in the I.C.C. insurance regulation (49 C.F.R. § 1043.1), and who are specifically excluded by the language of the policy." *Id.* at 139. As this passage makes clear, the court's ruling did not "extend[] only to the effect of 49 C.F.R. § 1057.4." Resp. Br. at 17 n.13. Rather, the court explicitly relied on the "relevant I.C.C. regulation on insurance, 49 C.F.R. § 1043," and held that it "contains no provision which would require a motor carrier specifically to carry insurance affording liability coverage for judgments rendered solely against an owner-operator." 496 F.2d at 138. That provision, quoted by the court, is identical in all relevant respects to the regulation in force today. *Compare id.* at 138 n.8 *with* 49 C.F.R. § 387.301, Pet. App. at 43a-44a. Section 1043, moreover, specifically provided that insurance endorsements had to be "in the form prescribed and approved by the ICC." 49 C.F.R. 1043.7 (1978). Thus, contrary to respondents' claim, *Wellman* did address the predecessor of the MCS-90, and held that it did not require coverage for judgments entered only against third parties. In short, *Wellman* is legally and factually indistinguishable from the Ninth Circuit's decision, and stands in direct conflict with it.

In *White v. Excalibur Ins. Co.*, 599 F.2d 50, 55 (5th Cir. 1979), the court held that "in order for [the insurance company] to be liable under the policy filed by [its insured motor carrier] with the ICC, [the motor carrier] must first be adjudicated liable as a party." Though this ruling flatly contradicts the decision below, respondents argue that *White* dealt only with workers' compensation, and is therefore inapplica-

ble. But the *White* addressed two separate issues. The court first held that the state workers' compensation scheme prevented recovery under state tort law, then turned to a separate federal claim against the insurer. In conflict with the Ninth Circuit, the court held that the plaintiff could recover from the insurer under federal law only if it obtained a judgment against the carrier.

Respondents point out that the court also noted that the plaintiff could not recover because the injured party was not an "intended beneficiary" of the federal law. But the central basis for the court's decision was the absence of a judgment against the insured motor carrier. In any event, this Court has long held that an alternative holding is binding precedent that establishes a conflict between circuit court decisions. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949). Respondents also claim that *White* is irrelevant because it "deals with statutory language applicable when the motor carrier does not own the motor vehicle at issue." Resp. Br. at 19. But the Fifth Circuit explicitly ruled on the basis of 49 U.S.C. § 315, the nearly identical predecessor of 49 U.S.C. § 13906. Both of these statutes refer to the obligations of a "motor carrier," without drawing any distinction between owned and leased vehicles.

In *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128, 136-39 (3d Cir. 1979), the court thoroughly examined the BMC-90 endorsement and the statute and regulations that it implemented. In conflict with the Ninth Circuit, the court concluded that "49 U.S.C. § 315 and 49 C.F.R. § 1043.1(a) . . . require only that the [motor] carrier give security to pay any final judgment required against *such motor carrier*; they mention nothing about defense of actions and nothing about payment of judgments recovered against the other parties such as lessors." *Id.* at 139 (emphasis in original).

Respondents urge the court to disregard this fundamental difference on the ground that *Carolina Casualty* involved a dispute between insurers, but offers no principled explanation why this factual distinction provides a basis for doing so. Respondents also emphasize that the court assumed, without deciding, that the insurer of a regulated motor carrier would have to compensate an injured member of the public, if neither the motor carrier nor another party could do so. Resp. Br. at 20-21.[3] But respondents ignore the court's prior assumption in this hypothetical – that the insured motor carrier is "the only available defendant in this case." 595 F.2d at 137. Thus, even the court's dictum makes clear that in order for the insurer to be held liable, there must be a judgment against its insured motor carrier.

2. As to the merits, respondents' structural and "plain language" arguments are insubstantial or flatly incorrect. First, our interpretation of the MCS-90 does not deprive it of all effect. Resp. Br. at 1 n.1, 24.[4] Like respondents and the Ninth Circuit, we believe that the MCS-90 protects the public by requiring insurers to pay judgments when underlying policies would not require them to do so. Though our understanding of the MCS-90 differs in that we believe that an injured party must obtain a judgment against the insured motor carrier to obtain this protection, it in no way deprives the MCS-90 of all meaning.

Second, respondents argue that the term "insured" in the MCS-90 cannot refer only to the named insured motor carrier. They say that if the "legislature" had wished to limit the

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[3] Respondents try to bring themselves within this hypothetical rule by claiming that Garcha and Blue Star had no insurance. *See also* Resp. Br. at 3, 15. But the courts below did not make or rely upon such a finding, which has no support in the record.

[4] Nor does this interpretation seek to avoid contractual risks that Petitioner knowingly assumed. Contrary to respondents' assertions, Resp. Br. at 4, 23, petitioner did not agree to insure permissive users of all of Sahota's vehicles; rather, it assumed responsibility for all *listed* vehicles.

MCS-90 in this way, it would have used the term "motor carrier" or "named insured." Resp. Br. at 24. But Congress in fact did use the former term when creating the regulatory requirement that the MCS-90 implements. And the overall structure of the BMC-90 and MCS-90 indicate that the ICC and the DOT intended "insured" to refer only to the named insured motor carrier. Pet. at 17-18. For example, the endorsements provide that cancellation "may be effected by the company or the insured." As it would be nonsensical to give third parties a right to cancel, the term can only refer to the named insured. Respondents' argument that the MCS-90 makes a distinction between "motor carrier" and "insured" is simply wrong. The MCS-90 seeks "to assure compliance *by the insured*, within the limits stated herein, *as a motor carrier of property*, with . . . the Motor Carrier Act." Pet. App. at 42a (emphasis added). On its very face, the MCS-90 *equates* the two terms, rather than distinguishing them. Finally, even if the term "insured" could be read to include additional insureds, it would not support respondents' "textual" argument. Given the unchallenged finding that respondents are not "insureds" under the policy, the MCS-90 can permit recovery from petitioner only by altering the policy terms. There is no textual justification for this transformation.

3. Respondents suggest that the issue presented here is not sufficiently important to merit this Court's review. Respondents say that only two cases deal with the application of the MCS-90 to the facts at issue here, Resp. Br. at 26, and imply that the ICC Termination Act of 1995 rendered the MCS-90 inapplicable to accidents occurring after 1995, *id.* at 27. Again, respondents are wrong. The question presented by this petition arises often, and will continue to do so.

Beyond the two cases cited by respondents, many recent federal and state decisions involve efforts by injured parties to recover from insurers of motor carriers without first obtaining judgments against the motor carriers. A small sam-

pling of these cases shows that this problem recurs, and that most courts reject the Ninth Circuit's approach. *See, e.g.*, *Wellman*, 496 F.2d at 131; *Del Real v. United States Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 964 (E.D. Cal 1998) (holding that injured party could not recover from motor carrier's insurer for judgment entered only against motor carrier's lessees); *Progressive County Mut. Ins. Co. v. Carway*, 951 S.W.2d 108, 114 (Texas Ct. App. 1997) (holding that injured party who obtained default judgment against driver, but not motor carrier, could not recover from insurer under the MCS-90); *Lynch v. Yob*, No. 99-T-0065, 2000 WL 1804349, at *3-*4 (Ohio App. Dec. 8, 2000) (holding that MCS-90 did not authorize recovery from insurer because none of the defendants was a "named insured" in the underlying policy); *Transport Indem. Co. v. Teter*, 575 S.W.2d 780 (Mo. Ct. App. 1978) (holding that insurer was not liable under BMC-90 because the driver of the vehicle was not an insured under the base policy). There are also many reported cases of injured parties obtaining judgments against both insured motor carriers and drivers. *See, e.g.*, *T.H.E. Ins. Co. v. Larsen Intermodal Servs.*, 242 F.3d 667, 672 (5th Cir. 2001) ("[T]he injured plaintiffs filed their petitions against Larsen [the motor carrier, its driver, and T.H.E. in state court"). If this Court allows the Ninth Circuit's erroneous decision to stand, injured parties are likely to dispense with suits against the motor carriers named in the insurance policies.[5]

Second, respondents' suggestion that the ICC Termination Act of 1995 did away with the MCS-90 is wrong. As

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[5] *Wellman* shows why parties will choose this path. By obtaining a default judgment against the driver, avoiding the motor carrier, and then suing the insurer, the plaintiff avoided the "most difficult task of establishing legal liability against [the motor carrier]" in the face of a police accident report finding the plaintiff at fault. 496 F.2d at 139 n.10. Thus, it is scarcely "ludicrous," Resp. Br. at 26 n.16, to assume that plaintiffs will use the Ninth Circuit's rule strategically to overcome flaws in their cases.

the Ninth Circuit noted below, the abolition of the ICC did not affect existing regulations: "the old ICC regulations remain in effect until the new regulations are promulgated." Pet. App. at 6a n.3. The DOT has not promulgated new regulations, and the MCS-90 endorsement and related regulations remain intact at 49 C.F.R. § 387. As the relevant language of the ICC Termination Act, *see* Pet. App. at 37a, is identical in all relevant respects to the prior statutory language, there is no reason to think that the DOT will suddenly repeal the MCS-90. Thus, the proper interpretation of this endorsement is a matter of continuing importance.

4. In the end, respondents fall back on the shopworn tactic of presenting this Court with a state-law argument they would assert on remand if the Court were to rule for petitioner. But such an argument provides no basis for denying review. This petition presents an important and recurring question of federal law, regardless of the alternative state-law theories that respondents may later assert.

In any event, respondents could not prevail under California law, which does not require petitioner to provide coverage for Garcha and Blue Star. Under section 11580.1(b)(4) of the California Insurance Code, a policy that provides insurance to the named insured "with respect to any owned or leased motor vehicle covered by the policy" must also provide coverage to a permissive user of the vehicle "to the same extent that insurance is afforded to the named insured." It is undisputed, however, that Sahota's trailer was not listed on the John Deere policy. As a result, that policy did not "cover" Sahota's unlisted trailer, and did not afford Sahota any insurance with respect to it. Thus, section 11580.1 provides no coverage for permissive users of the trailer, and no basis for respondents to oppose review.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted.

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